(1)
Supreme Court, U.S.
FILED
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No. 00-874

In the Supreme Court of the United States

MICHAEL S. MATTHEWS,

Petitioner,

v.

HOWARD COUNTY, MARYLAND; CHARLES ECKER; BARBARA KRANKOWSKI; RAQUEL SANUDO; JAMES N. ROBEY; WAYNE LIVESAY; JIMMIE LYNN SAYLOR; and GWEN K. WEST,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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37pp

QUESTION PRESENTED

I. Can an employer assert as an affirmative defense to liability, that a plaintiff job applicant would not have been hired, despite admitted unlawful discrimination, after enactment of the Civil Rights Act of 1991?

PARTIES TO THE PROCEEDINGS

Petitioner is Michael S. Matthews. He was plaintiff in the District Court and appellant in the Court of Appeals.

Respondents are Howard County, Maryland, a Charter entity, Charles Ecker, Barbara Krankowski, Raquel Sanudo, James N. Robey, Wayne Livesay, Jimmie Lynn Saylor, and Gwen K. West. They were defendants in the District Court and appellees in the Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

FACTUAL SUMMARY 2

PROCEDURAL HISTORY 3

REASONS FOR GRANTING THE WRIT 6

I. THE FOURTH CIRCUIT DEPARTED FROM THE UNIFORM HOLDING OF OTHER CIRCUITS THAT TITLE VII, AS AMENDED IN 1991, EMBRACES ALL CLAIMS BY INDIVIDUALS SUBJECTED TO ILLEGAL DISCRIMINATION. 6

A. The Civil Rights Act of 1991 Granted an Affirmative Defense Only as to Certain Remedies, and Statutorily Altered the Former Rule of This Court That Demonstrating a

Different Outcome in a Challenged Employment Decision Was a Part of the Plaintiff's Case. 6

B. All Courts of Appeals Other Than the Fourth Circuit Adhere to an Interpretation of Title VII Under Which Matthews Stated a Cause of Action Because He Was Subjected to Intentional, Unlawful Discrimination Based on His Race. 8

II. SUFFICIENT GROUNDS EXIST FOR SUMMARY DISPOSITION OF THIS CASE. 10

CONCLUSION 13

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Estepp, 95 F.2d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997) 4, 5, 8, 9, 10

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) 11

Bureau of Economic Analysis v. Long, 454 U.S. 934 (1981) 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 5

Eaton v. Tulsa, 415 U.S. 697 (1974) 10

Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999) 9

Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572 (1st Cir. 1999) 3

Harris v. Shelby County Bd. of Educ., 99 F.3d 1078 (11th Cir. 1996) 9

Mardell v. Haleysville Life Ins. Co., 31 F.3d 1221 (3rd Cir. 1994) 8

Medlock v. Ortho Biotech, Inc., 164 F.3d 545 (10th Cir. 1999) 9

O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996) 9

TABLE OF AUTHORITIES (Cont'd)

	Page
Texas v. LeSage, 528 U.S. 18, 120 S. Ct. 467 (1999)	10, 11
Constitution and Statutes	
U.S. Const. amend. 14, § 1.	1, 3, 5
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2106	10
42 U.S.C. § 1983	1, 3, 5, 10, 11, 12
42 U.S.C. § 1985	1, 4
42 U.S.C. § 1986	1, 4
42 U.S.C. § 2000e-2(m) (Civil Rights Act of 1991)	1, 7, 10, 11, 12, 13
42 U.S.C. § 2000e-5(g)(2)(B)	7
Other Authorities	
H.R. Report No. 102-40 (I), *reprinted in* 1991 U.S.C.C.A.N. 549	7
Sup. Ct. Rule 16.1	10

Petitioner Michael S. Matthews ("Matthews") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

The initial question presented is simple: Is proof that an employer would have made the same employment decision an affirmative defense to liability in a case of employment discrimination? The answer, under the plain meaning of the relevant statute and according to well-established precedent in all circuits that have considered the issue, is "No." The Court of Appeals' decision, however, reaches a contrary conclusion, and, if left to stand, would conflict with the statute as well as this Court's and all of those Courts of Appeals' case law.

Matthews respectfully suggests granting certiorari, or, in the alternative, summary reversal of the Court of Appeals decision.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (App. 3a) is not reported. The decision of the District Court (App. 7a) dismissing the Title VII claim at issue is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 2000. The Court of Appeals denied a petition for rehearing and rehearing en banc in an order dated and entered on September 19, 2000. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTOIRY PROVISIONS INVOLVED

1. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

3. The Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, and 1986, provides federal civil causes of action against individuals who act under color of State law to intentionally deprive persons of rights protected by federal statute or the Constitution, as well as against those who conspire to deprive others of those rights, or who neglect or fail to prevent such conspiracy.

FACTUAL SUMMARY

The United States Equal Employment Opportunity Commission ("EEOC") found, and Howard County concedes, that the County used a discriminatory hiring process in 1995. (App. 10a.) Under this process, most applicants only had to score two out of a possible three "Excellents" in their

interview to be considered for employment. (App. 9a.) Individuals of Matthews's race and sex, however, were required to score three out of three "Excellent" scores to be considered for employment. (App. 10a.) Matthews scored two "Excellents," and was thus not considered for employment under this discriminatory scheme. Other individuals, who likewise scored only two Excellents but who were of a race and sex different from Matthews, were considered and hired by Howard County. (App. 10a.) These facts are uncontested.

PROCEDURAL HISTORY

Matthews is a decorated, twenty-year veteran of the District of Columbia Metropolitan Police Department, who filed suit against Howard County under Title VII and the Age Discrimination in Employment Act (the ADEA claim was subsequently dropped). (App. 7a.) The Complaint properly alleged timely filing of charges of discrimination with the EEOC, and the Determination by the EEOC, after a three-year investigation, that Howard County had in fact unlawfully discriminated against a protected class. Conciliation sponsored by the EEOC lasted the greater part of a year before the EEOC referred the matter for prosecution by the Civil Rights Division of the Department of Justice ("DOJ"). DOJ instead issued a Notice of Right to Sue Letter to Matthews.

Additional counts of the Complaint alleged that Howard County and its individual officers were liable for violations of 42 U.S.C. § 1983, in acting under color of State law to violate Matthews's due process and equal protection rights under the Fourteenth Amendment. The Complaint also alleged violations of

42 U.S.C. §§ 1985 and 1986 against the individual defendants, for conspiracy to violate established constitutional rights and their respective neglect or failure to prevent those constitutional violations. The Complaint sought a declaration that Matthews's rights had been violated; equitable relief to vindicate Matthews's rights to be free of discrimination as to race and sex; and compensatory and punitive damages for the denial to Matthews of the right to compete on an equal footing.

Howard County moved to dismiss, or in the alternative for summary judgment. (App. 7a.) Matthews cross-moved for partial summary judgment as to liability and for class certification. (App. 7a.)

Before the District Court, Howard County argued that it was not liable because Matthews would not have been hired even in the absence of unlawful discrimination. (App. 12a.) The District Court accepted this affirmative defense and dismissed the Complaint. It found that "[n]o reasonable fact finder could find that plaintiff would have been hired over the white males that received better scores than he. Therefore, the underlying factual premise of plaintiff's damage claim is fatally flawed." (App. 12a.) For support, the court cited *Alexander v. Estepp*, 95 F.2d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997). The court likewise ruled that Matthews's constitutional claims were time-barred and denied class certification. (App. 15a.)

Matthews appealed to the Court of Appeals, which affirmed the District Court's decision in a per curiam screening panel opinion. (App. 3a.) The panel likewise cited *Alexander*. The opinion makes no examination of whether the race and sex

discrimination was the cause for Matthews's dismissal from the hiring process, or if such causation should even matter under a Title VII analysis. Instead, the opinion merely states "we agree with the district court's holding that Matthews failed to assert a viable claim of employment discrimination that would entitle him to relief. *See Alexander v. Estepp*, 95 F.3d 312, 317 (4th Cir. 1996)." (App. 4a.)

In *Alexander*, unsuccessful job applicants to the Prince George's County, Maryland Fire Department sued under 42 U.S.C. § 1983 for violation of their constitutional right to equal protection of the laws, when minority applicants, who ranked lower than those applicants did on a merit list, were hired. The Fourth Circuit in *Alexander*, applying this Court's holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), ruled that the Prince George's County affirmative action program was not narrowly tailored and therefore violated the Fourteenth Amendment's Equal Protection Clause. 95 F.3d at 315-316.

All but one of the *Alexander* plaintiffs, however, ranked too low to have been hired on the merit system, even absent the advancement of lower-ranked minority applicants ahead of them. Accordingly, the Fourth Circuit in *Alexander* held that because "the existence of the affirmative action program did not cause them to be denied employment opportunity, the plaintiffs (except Reedy) may not be awarded any personal relief." *Id.* at 317. The *Alexander* plaintiffs did not invoke, and the *Alexander* opinion nowhere discussed, Title VII of the Civil Rights Act.

Matthews next petitioned the Court of Appeals for rehearing and rehearing en banc, pointing out the courts' reliance on a Section 1983 opinion to decide a

Title VII issue. The Court of Appeals held the petition for three months, before it denied rehearing. (App. 1a.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DEPARTED FROM THE UNIFORM HOLDING OF OTHER CIRCUITS THAT TITLE VII, AS AMENDED IN 1991, EMBRACES ALL CLAIMS BY INDIVIDUALS SUBJECTED TO ILLEGAL DISCRIMINATION.

A. The Civil Rights Act of 1991 Granted an Affirmative Defense Only as to Certain Remedies, and Statutorily Altered the Former Rule of This Court That Demonstrating a Different Outcome in a Challenged Employment Decision Was a Part of the Plaintiff's Case.

Assuming *arguendo* that the District Court correctly held that Matthews would not have been hired even in the absence of unlawful discrimination, he still has a claim. The language of the 1991 Civil Rights Act makes this clear:

> An unlawful employment practice is established when the complaining party demonstrates that race, Color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). The 1991 Act reinforced the presence of liability, specifying that relief is available even when an employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). The congressional report accompanying the 1991 Act removed any vestige of doubt:

> [P]roof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine *not the liability* for discriminatory practices, *but only the appropriate remedy*. ...
> .... [T]he complaining party must demonstrate that discrimination *actually contributed* or was otherwise *a factor in* the employment decision or *action*. .... [A]n employer may be held liable for any discrimination that is actually shown to play a role in the contested employment decision.

H.R. Report No. 102-40 (I) at 48, *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (emphases both added and original).[1]

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[1] Race was admitted to be a motivating factor in Howard County's decision not to hire Matthews. The County concedes that, had Matthews been of a different race, his application would have advanced in the hiring process. Other applicants with Matthews's scores were considered and, in fact, hired. (App. 10a.) Had

The conceded facts in this case further support Matthews's claim under Title VII for relief. Unlike the situation in *Alexander*, the dismissal of Matthews from the Howard County hiring process was not independent of the unlawful discrimination. Matthews did not fail to make a cutoff on an otherwise unbiased merit list. Howard County hired applicants with scores identical to Matthews's scores. (App. 10a.) Howard County therefore could (and would) have hired Matthews but for his race and sex.

B. All Courts of Appeals Other Than the Fourth Circuit Adhere to an Interpretation of Title VII Under Which Matthews Stated a Cause of Action Because He Was Subjected to Intentional, Unlawful Discrimination Based on His Race.

All Circuits, other than the Fourth Circuit, that have considered this question have agreed that a plaintiff may maintain a claim for relief even if he would not have been hired absent unlawful discrimination. *See, e.g., Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("the employee may be entitled to equitable relief so long as he has proven that the proscribed factor played some part in the decisional calculus"); *Mardell v. Haleysville Life Ins. Co.*, 31 F.3d 1221, 1232 (3rd Cir. 1994)

Matthews's race been different, he would not have been dismissed. It is thus undisputed that race was a motivating factor.

("plaintiff is entitled to some relief even if the employer actually would have taken the same action at the same time absent any invidious motive"), *vacated for reconsideration on other grounds*, 514 U.S. 1034 (1995); *Excel Corp. v. Bosley*, 165 F.3d 635, 638 (8th Cir. 1999) ("an employee is entitled to relief if he or she proves that impermissible discrimination was a 'motivating factor' in the employment decision, 'even though other factors also motivated' the employer's decision"); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996) ("liability in mixed-motive cases is deemed established once the employee shows that a discriminatory criterion was a motivating factor in the employer's decision"); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999) (Section 107 "overruled the Supreme Court's decision in *Price Waterhouse* to the extent that that decision holds an employer can avoid a finding of liability"); *Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1084 (11th Cir. 1996) ("plaintiff in a Title VII action prevails whenever he or she proves that one of the delineated characteristics was a motivating factor behind a particular employment decision, even if there were other, even legitimate, factors motivating that decision as well").

Yet the District Court in this case applied a completely contrary standard, ruling that "it would be speculative to infer that plaintiff would have been hired *but for* the alleged discrimination," and therefore dismissed the Complaint. (App. 12a (emphasis added).)

Alexander v. Estepp, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997), the case upon which the District Court and the Court of Appeals both relied, does not support this interpretation of the law under

Title VII. The cited portion, and indeed the entire holding, of *Alexander* concerns Section 1983 claims. The Fourth Circuit erred in extending the reasoning of that case to the Title VII context, because the two statutes set out completely different standards of causation. *See, e.g., Texas v. LeSage*, 528 U.S. 18, 120 S. Ct. 467, 468 (1999) (per curiam) (Under § 1983, "the government can avoid liability by proving that it would have made the same decision without the impermissible motive."). Congress specifically changed the causation standard under Title VII, in the 1991 Civil Rights Act, in order to allow plaintiffs to maintain a claim, even if they could not prove that they would have been hired absent the unlawful discrimination.

II. SUFFICIENT GROUNDS EXIST FOR SUMMARY DISPOSITION OF THIS CASE.

Rule 16.1, governing the Court's dispositions of petitions for certiorari, provides that an appropriate order in a given case "may be a summary disposition on the merits." Sup. Ct. Rule 16.1. Some cases are thought important enough to justify review, but not difficult enough to necessitate full briefing and oral argument. The Court is clearly empowered by the provisions of 28 U.S.C. § 2106 to make such a disposition in the interest of justice.

A clearly erroneous decision correctible by summary reversal should involve an error of greater magnitude than the mere technical, harmless, or parochial error. *See Eaton v. Tulsa*, 415 U.S. 697, 707 (1974). In this case, the decision of the courts below directly contravenes the specific language of the 1991

Civil Rights Act. By ignoring the direct language of Congress forbidding intentional discrimination, the Fourth Circuit placed itself at odds with all other circuits that have considered the question, and that court cut off the federal statutory rights of all individual job applicants across the Fourth Circuit. Such a result is anything but harmless.[2]

In *Texas v.LeSage*, 520 U.S. 18, the Court has recently made a summary dispostion of a case that presented a mirror image to this one. In *LeSage*, the Fifth Circuit had reversed a district court's summary judgment for the defendants in a Section 1983 case, on the basis that LeSage had made out a claim under Section 1983 even if the facts were ultimately to show that he would not have been admitted to the challenged academic program under a race-neutral policy. This Court reversed the Fifth Circuit in a per curiam, summary disposition, ruling that prior precedents in the Section 1983 context made clear that causation under Section 1983 was stricter than the Title VII standard. *Texas v. LeSage*, 520 U.S. 18, 120 S. Ct. 467 (1999) (per curiam) (granting certiorari and reversing Section 1983 claim, while leaving other matters open on remand). Where the Fifth Circuit in *LeSage* wrongly applied a Title VII-like standard to a Section

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[2] At least one circuit has ruled that unpublished opinions are constitutionally entitled to precedential value and effect. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). Accordingly, the Fourth Circuit's ruling, left undisturbed, threatens significant disruption of future civil rights holdings enforcement in that circuit, if not in others as well.

1983 case, here the Fourth Circuit has wrongly applied the Section 1983 standard to a Title VII claim.

The material facts in this case are uncontested. The rule of federal law is clear and set forth directly in the language of the statute. And the decision of the courts below rests unequivocally on a simple and straightforward, yet demonstrably incorrect, statement of the law.

The Court can redress the serious error of the courts below without undue investment of time in briefing and oral argument, by summarily reversing the Fourth Circuit's holding. Alternatively, the Court might vacate and remand this case for reconsideration in light of the Civil Rights Act of 1991. *Cf. Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981).

* * * * *

Michael Matthews, a 20-year veteran of the Washington, D.C. police force, was qualified to join the Howard County Police Department, in that he met the hiring qualifications for women or non-whites, and he would have been hired, had his race or sex been different. Other applicants with his score of two Excellents were hired, thus Matthews himself could have been hired.

The Court should uphold the strong policy against intentional discrimination and grant certiorari, or, in the alternative, summarily reverse the Court of Appeals, to address the inconsistencies between its per curiam opinion and the well-established law.

CONCLUSION

For the reasons set forth above, the Court should grant the Petition for Certiorari and summarily reverse the judgment below, or in the alternative, remand for further proceedings consistent with the Civil Rights Act of 1991.

Respectfully submitted,

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APPENDIX
TABLE OF CONTENTS

	Page
Court of Appeals' Order Denying Petition for Rehearing and Rehearing en banc (September 19, 2000)	1a
Court of Appeals' Opinion (June 20, 2000)	3a
District Court's Order (November 30, 1999)	6a
District Court's Memorandum Opinion Dismissing the Complaint (November 30, 1999)	7a

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

FILED
September 19, 2000

No. 99-2654
CA-99-2032-JFM

MICHAEL S. MATTHEWS, in his own right, and as representative on behalf of a class of plaintiffs similarly situated

Plaintiff-Appellant

v.

HOWARD COUNTY, MARYLAND, a charter entity; CHARLES ECKER, in both his individual and official capacities; BARBARA KRANKOWSKI, in both her individual and official capacities; RAQUEL SANUDO, in both her individual and official capacities; JAMES N. ROBEY, in both his individual and official capacities; WAYNE LIVESAY, in both his individual and official capacities; JIMMIE LYNN SAYLOR, in both her individual and official capacities; GWEN K. WEST, in both her individual and official capacities

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2654

MICHAEL S. MATTHEWS, in his own right, and as representative on behalf of a class of plaintiffs similarly situated,

Plaintiff-Appellant,

v.

HOWARD COUNTY, MARYLAND, a charter entity; CHARLES ECKER, in both his individual and official capacities; BARBARA KRANKOWSKI, in both her individual and official capacities; RAQUEL SANUDO, in both her individual and official capacities; JAMES N. ROBEY, in both his individual and official capacities; WAYNE LIVESAY, in both his individual and official capacities; JIMMIE LYNN SAYLOR, in both her individual and official capacities; GWEN K. WEST, in both her individual and official capacities,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
J. Frederick Motz, Chief District Judge.
(CA-99-2032-JFM)

Submitted: May 31, 2000

Decided: June 20, 2000

Before LUTTIG, WILLIAMS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Theodore M. Cooperstein, THEODORE M. COOPERSTEIN, P.C., Washington, D.C., for Appellant. Barbara M. Cook, Howard County Solicitor, Louis P. Ruzzi, Senior Assistant County Solicitor, Ellicott City, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this Circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Michael S. Matthews appeals the order of the district court granting the motion to dismiss or for summary judgment of defendant Howard County, Maryland (County). We affirm.

Matthews first challenges the district court's judgment against him on his Title VII claim. Having reviewed the record, we agree with the district court's holding that Matthews failed to assert a viable claim of employment discrimination that would entitle him to relief. *See Alexander v. Estepp*, 95 F.3d 312, 317 (4th Cir. 1996).

As to his civil rights claims, the district court correctly held that the relevant, three-year statute of limitations had expired before Matthews filed his claim. *See Causey v. Balog*, 162 F.3d 795, 804 (4th Cir. 1998). Section 1986, 42 U.S.C. (1994), contains its own one-year limitation, which was also expired. Nor are we persuaded by any of Matthews's arguments concerning tolling, equitable estoppel, or continuing violation.

Finally, we conclude that the district court did not abuse its discretion in refusing to certify a class. *See United States v. Jones*, 136 F.3d 342, 349 (4th Cir. 1998). We affirm the ruling of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL S. MATTHEWS

v. Civil Action No. JFM 99-2032

HOWARD COUNTY, MARYLAND, et al.

*****

ORDER

For the reasons stated in the memorandum entered herewith, it is this 30th day of November 1999

ORDERED

1. defendants' motion to dismiss is granted;

2. plaintiff's motion for partial summary judgment is denied;

3. plaintiff's motion for class certification is denied; and

4. this action is dismissed for failure to state a claim upon which relief can be granted.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL S. MATTHEWS

v. Civil Action No. JFM 99-2032

HOWARD COUNTY, MARYLAND, et al.

MEMORANDUM

Michael S. Matthews claims in this action that he was improperly denied the opportunity to proceed to the final stages of a probationary police officer hiring process initiated by the Howard County Police Department in 1995 due to his race and gender.[1] He asserts claims under Title VII and 42 U.S.C. §§ 1981, 1983, and 1985. Defendants have filed a motion to dismiss.[2] The motion will be granted.

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[1] Plaintiff originally also claimed discrimination on the basis of age, but has amended his complaint to exclude such a charge.

[2] Plaintiff has filed a motion for partial summary judgment on the issue of liability. Since, for the reasons stated in Section II of this memorandum, he has failed to state a claim upon which relief can be granted because he claims no cognizable relief, any opinion I would render on the lawfulness of the selection method used by the County in the 1995 hiring process would be entirely advisory. Accordingly, plaintiff's motion will be denied.

Howard County initiated a hiring process in 1995 to fill 26 vacant probationary police officer positions within the Police Department. The process consisted of the following components: recruitment, physical ability testing, written testing, personal history questionnaire, oral interview, background investigation, conditional offer of employment, polygraph examination, psychological screening,

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Plaintiff has also moved for certification of a plaintiff class. That motion too is denied for four reasons. First, the questions of law and fact common to the members of the purported class do not predominate over questions affecting only individual members, such as issues relating to damages and limitations. Second, a class action is not superior to other available methods for the fair and efficient adjudication of the controversy. To the extent that individual members of the proposed class have cognizable claims against defendants, the common issues relating to the lawfulness of the selection method used in the 1995 hiring process can be adjudicated in a single proceeding and have res judicata effect in any other actions. Third, plaintiff's claim is not typical of the claims of all the members of the purported class since some members of the class received three excellent scores and others (including plaintiff) received only two excellent scores on their interview questions. Fourth, since plaintiff's claim is weaker on the merits than the members of the purported class who received there excellent scores, he could not adequately protect the interests of the latter. See Fed. R. Civ. P. 23.

medical examination, and final selection. At the time the hiring process was initiated in 1995, the Department maintained an affirmative action plan to address a recognized under-representation of women and minorities in the Department and to serve better a diverse urban population.

Matthews applied for a position and began the hiring process. All applicants were required during the physical ability testing to drag a 160-pound body for a distance of 50 feet. After the testing, the dummy was weighed and found to weigh in excess of 160 pounds. All those failing the physical agility test were invited to take the test again. Thirteen women who had failed the test availed themselves of this opportunity, but the one male who had failed the test did not. Those candidates who had passed the test with the heavier dummy were not tested again.

During the interview process, each candidate was asked the same interview questions by each panel of interviewers, and each panel rated the candidate as "excellent," "acceptable," or "unacceptable." Because the Department had limited resources and could not conduct background investigations for a large pool of applicants, and "[b]ecause white males predominated in the group receiving three ratings of 'Excellent,'" the Department determine that it would move all persons receiving three scores of excellent and all women and minorities receiving two scores of excellent and one of acceptable to the background stage of the process. Def.'s Mot. Dismiss at 8. This was done "in an effort to address the goals and objectives established by the Department's

Affirmative Action Plan." Id. Overall, 50 white males, 27 minority males, 10 white females, and 6 minority females receiving three scores of excellent, as well as 14 minority males, 10 white females, and 6 minority females receiving two scores of excellent and one of acceptable, were moved forward to the background phase. There were 30 white males, including the plaintiff, whop had received two ratings of excellent and who were not moved forward to the background phase. The final class of 26 officers chosen included three individuals who had received only two excellent ratings.

The EEOC issued a determination on June 25, 1998, finding that there was cause to believe that "minority and female candidates were treated more favorably than white male candidates with regard to selection decisions for police officer positions," and that there was cause to believe that the County "engaged in a pattern and practice of discrimination with regard to white males as a class." EEOC Determination (June 25, 1998). Although conciliation efforts failed between Matthews and the County, the EEOC and the County reached a conciliation agreement that resolved the EEOC's pattern and practice finding as to white men as a class. As part of that agreement, the County agreed never again to employ the selection method used in the 1995 hiring process that favored women and minorities over white males.

II.

Defendants first argue that plaintiff has failed to state a claim upon which relief can be granted

because he has asserted no claim for cognizable relief. The argument is meritorious.

A.

There is no doubt that, assuming plaintiff was unlawfully discriminated against during the hiring process, this court has the power to order the Police Department now to consider his application for employment. See generally Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976) (holding that Title VII "vest[s] broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate'") (citing 42 U.S.C. § 2000e-5(g)); Darnell v. City of Jasper, 730 F.2d 653, 655-56 (11th Cir. 1984) (ordering city to administer a civil service exam to the plaintiff, and to hire him as a police officer if he passed the examination and met the other qualifications for the position). Plaintiff, however, has advised defendants (and stated during oral argument) that he does not wish to be considered for employment by the Police Department at the present time.[3] Thus, plaintiff

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[3] One of the reasons plaintiff does not want to seek employment with the Police Department is that since he submitted his original application, he has been involved in an automobile accident and does not believe that he could pass the physical examination.

does not seek as relief an order that his application be considered.

Instead, plaintiff claims monetary damages stemming from the fact that he was not hired in the first instance. He has alleged no facts that would entitle him to such relief. On the undisputed factual record, it would be speculative to infer that plaintiff would have been hired but for the alleged discrimination. It is true, as plaintiff alleges, that he was among 30 white males who received two ratings of excellent on his interview questions but who, unlike 14 minority males, 10 white females, and 6 minority females receiving only two excellent scores, was not moved forward to the background phase of the hiring process. However, there were 50 white males who had received three, not two, scores of excellent on the interview questions, and there were only 26 slots to be filled. No reasonable fact finder could find that the plaintiff would have been hired over the white males who had received better scores than he. Therefore, the underlying factual premise of plaintiff's damage claim is fatally flawed. Cf. Alexander v. Estepp, 95 F.3d 312 (4th Cir. 1996), cert. denied, 520 U.S. 1165, aff'd, 181 F. 3d 86 (4th Cir. 1999) (finding that applicants could not be awarded any personal relief in action challenging county fire department's affirmative action program, since they did not rank highly enough to have been offered a job even in the absence of program); Pennsylvania State Police v. Penn. Human Relations Comm'n, 517 A.2d 1253 (Pa. 1986) (holding that awarded enrollment in state police academy and back pay was inappropriate because it is impossible

for the employer to anticipate the results of uncompleted steps in an application process).

In his memorandum opposing defendants' motion to dismiss, plaintiff suggests that he is also seeking compensatory damages for intangible harms, including emotional distress, mental anguish, and damage to his reputation. He asserted no such claim in his amended complaint. More fundamentally, he has alleged no facts that would meet the standards of proof established by Fourth Circuit law for a plaintiff seeking such damages. See Price v. City of Charlotte, 93 F.3d 1241, 1254-56 (4th Cir. 1996), cert. denied, 520 U.S. 1116 (1997).

The only other relief sought by plaintiff is an injunction prohibiting defendants from employing in the future the same affirmative selection process they used during the 1995 hiring process. This claim is insufficient for two reasons. First, since plaintiff has forsworn any interest in again applying for employment with the Police Department, the granting of such relief would be entirely academic as to him. Second, the granting of any such injunction lies in my discretion, see 42 U.S.C. § 2000e-5(g)(B) (1991), and I would not exercise my discretion to order the County to refrain from doing something that it has already agreed in its conciliation agreement with the EEOC that it will not do again.

III.

Defendants further assert that even if plaintiff has alleged facts sufficient to state a justiciable claim, all of his claims, other than his Title VII claim, are time-barred.

Maryland has a three year statute of limitations that applies to actions brought under 42 U.S.C. §§ 1981, 1983, and 1985. See Burnett v. Grattan, 468 U.S. 42 (1984). Section 1986 specifically provides for a one year statute of limitations for claims. Federal law determines the accrual of constitutional claims, and dictates that a civil rights claim accrues when facts that would support a cause of action are or should be apparent to the individual who asserts the cause of action, namely at the "point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977), cert. denied, 444 U.S. 842 (1979); see also Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975); Lewis v. Clark, 534 F. Supp. 714, 716-17 (D. Md. 1982).

Matthews knew of the operative facts giving rise to his cause of action by at least February 20, 1996. On that date, plaintiff wrote a letter to Raquel Sanudo, the County's Chief Administrative Officer, containing information that formed the basis of his later claim. In that letter Matthews alleged discrimination in the hiring process on the bases of sex and race. He wrote, "I believe that I am the casualty of a well intended but misapplied Affirmative Action Plan." Letter from Michael S. Matthews to Raquel Sanudo, Chief Administrative Officer, Howard County 3 (Feb. 20, 1996). Matthews timely pursued his claim with the EEOC, but did not file this suit until July 9, 1999, three months after the EEOC mailed to Matthews a "Notice of Right to Sue" letter.

To circumvent his limitations problems, Matthews asks the Court to apply either the continuing violation theory or the doctrine of equitable tolling in evaluating his constitutional claims. He also suggests that the County may have waived a limitations defense when the County's personnel officer waived time limitations for filing an employee appeal under the Howard County Code. These arguments are unpersuasive.

First, Matthews contends that the Court should toll the operation of limitations for the pendency of the EEOC investigation, which timely began in April 1996 and did not conclude until June 1998. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462-67 (1975), is squarely against this position. There, the Supreme Court rejected the argument that the applicable state law limitations period, in an action brought pursuant to § 1981, will be tolled because a Title VII complaint was pending in the administrative agency. The Court addressed the plaintiff's contention that an individual should not be forced to "split his cause of action." While acknowledging that it was both conceivable and expected that the failure to toll would press a § 1981 complaint into court before the EEOC had concluded its administrative proceedings, the Court identified one obvious answer to this dilemma: that a plaintiff could initiate his § 1981 action, and then ask the Court to stay proceeding until the administrative efforts at conciliation and voluntary compliance were complete. See id. at 465. Indeed, after the passage of 180 days from the filing of his charge of discrimination, Matthews could have demanded a

right-to-sue letter in order to institute the action himself, without waiting for the completion of the EEOC conciliation procedures, see 42 U.S.C. § 2000e-5(f)(1), so that he could join his Title VII claim with timely filed constitutional claims.

Second, as for his allegation of a continuing violation, Matthews cannot use the unsubstantiated claims of unnamed persons participating in selection processes after 1996 to resurrect retroactively constitutional claims as to the discrete wrongs he suffered in 1995. See Marshall v. Manville Sales Corp., 6 F.3d 229, 231 (4th Cir. 1993) (holding that a case involving refusal to hire, unlike a case involving continuous pay disparity, does not raise a present or continuing violation).

Third, Matthews' contention that a factual issue may exist as to whether the county's personnel officer waived the applicable time requirements in her letter dated March 4, 1996, is without merit. The letter offered to waive time frames specified within the Howard County Code in order to hear a personnel grievance, not to waive the limitations periods for filing constitutional causes of action in federal court. Moreover, Matthews does not state that he refrained from filing his constitutional claims based on this written statement.

A separate order effecting the rulings made in this memorandum is being entered herewith.

November 30, 1999

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

MOTION FILED
DEC 29 2000

(2)

No. 00-874

In the Supreme Court of the United States

MICHAEL S. MATTHEWS,
Petitioner,

v.

HOWARD COUNTY, MARYLAND; CHARLES ECKER; BARBARA KRANKOWSKI; RAQUEL SANUDO; JAMES N. ROBEY; WAYNE LIVESAY; JIMMIE LYNN SAYLOR; and GWEN K. WEST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF FOR *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY AND INDEPENDENT WOMEN'S FORUM IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Center for Equal Opportunity ("CEO") and the Independent Women's Forum ("IWF") respectfully move for leave to file this brief *amici curiae* in support of Petitioner Michael S. Matthews.

The Petitioner has consented to the filing of this brief, and a copy of the letter of consent is being filed simultaneously with the Clerk of the Court. Counsel for Respondents has withheld consent and opposes the filing of this brief.

The Center for Equal Opportunity is a nonprofit corporation. CEO's main purpose is to study issues concerning race, ethnicity, and language. CEO has participated actively in a wide variety of civil rights cases, including *Rice v. Cayetano*, 528 U.S. 495 (2000), *Shaw v. Reno*, 509 U.S. 630 (1993), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

The Independent Women's Forum is a nonprofit, nonpartisan organization founded by women to foster public education about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity.

CEO and IWF strongly condemn unlawful gender or race-based employment discrimination and thus have a substantial interest in the outcome of this case.

QUESTION PRESENTED

Under Title VII, is an employer liable when it concedes that unlawful discrimination was a motive in an adverse employment decision yet argues that other factors also motivated the employment decision, given that the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), states that "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice?"

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF
REASONS FOR GRANTING THE WRIT 3

REASONS FOR GRANTING THE WRIT 4

I. THE DECISIONS BELOW MISSTATE THE LAW. 4

A. The Civil Rights Act Of 1991 Expressly States That Howard County's "Mixed Motive" Claim Is Not A Defense To Title VII Liability. 4

B. The Two Cases Relied Upon By The Courts Below Are Inapposite. 6

II. THE DECISIONS BELOW DEPART SIGNIFICANTLY FROM PRIOR JUDICIAL HOLDINGS AND CAST CONFUSION ON AN IMPORTANT FEDERAL QUESTION. ... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Estepp,
95 F.3d 312 (4th Cir. 1996). 3,7

Pennsylvania State Police v. Penn. Human Relations,
517 A.2d 1253 (Pa. 1986). 3,6

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S.Ct. 1775 (1989). 4,5

Texas v. Lesage,
528 U.S. 18, 120 S.Ct. 467 (1999). 4,7,8

Statutes and Rules

42 U.S.C. § 1983 3,4,7,8

42 U.S.C. § 2000e-5(g)(B) 5,6,7

42 U.S.C. § 2000e-2(m) ..... *passim*

Other

H.R. Report No. 102-40 (I),
reprinted in 1991 U.S.C.C.A.N. 549 6

In the
Supreme Court of the United States

MICHAEL S. MATTHEWS,
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v.

HOWARD COUNTY, MARYLAND; CHARLES ECKER; BARBARA KRANKOWSKI; RAQUEL SANUDO; JAMES N. ROBEY; WAYNE LIVESAY; JIMMIE LYNN SAYLOR; and GWEN K. WEST,
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BRIEF FOR *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY AND INDEPENDENT WOMEN'S FORUM IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*[1]

The interests of the Center for Equal Opportunity and the Independent Women's Forum as *amici curiae* is set forth in the preceding motion for leave to file this brief.

[1] No party authored this brief in whole or in part or made monetary contributions to the preparation of this brief other than the *amici curiae*, its members and counsels.

STATEMENT OF THE CASE

Michael Matthews, a twenty-year veteran of the District of Columbia Police Department, submitted an employment application to the Howard County Police Department in 1995. Pet. App. 7a.

It is undisputed that the County's hiring process treated individuals differently based on race and sex. The hiring process included an interview. Women and minority applicants who received a score of two "excellents" in the interview advanced to the next step in the hiring process. White males, however, had to score three "excellents" to advance. Pet. App. 9a-10a.

Officer Matthews (and twenty-nine other white males) received only two "excellents" in the interview step and thus did not advanced. All non-white male individuals who scored only two "excellents" were advanced to the final step and three were hired. *Id.*

Officer Matthews filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC"), which found cause to believe that "minority and female candidates were treated more favorably than white male candidates." Pet. App. 10a. The EEOC and Howard County entered into a settlement, which required the County never again to use this hiring scheme. *Id.*

Howard County, however, refused to settle Officer Matthews' individual claim. Matthews thus filed an action in federal court under Title VII and other statutes, seeking compensatory and punitive damages, and declaratory and other relief. *Id.*

The District Court granted Howard County's motion to dismiss for failure to state a claim. Even if the hiring process were discriminatory, the court held, there can be no claim for damages in Title VII cases unless the plaintiff shows that he would in fact have been hired.

Because "it would be speculative to infer that plaintiff would have been hired but for the alleged discrimination," the court concluded that Matthews failed to state a claim under Title VII. Pet. App. 12a. The Fourth Circuit Court of Appeals affirmed in a *per curiam* disposition. Pet. App. 4a.

On November 29, 2000, Officer Matthews petitioned this Court for a writ of certiorari, suggesting that summary disposition may be appropriate.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Respondent Howard County concedes that it considered race as a factor in its hiring process but now seeks to avoid liability by arguing that Matthews would not have been hired anyhow for other reasons. The District Court accepted this argument, and the Court of Appeals affirmed.

The decisions below squarely contradict the Civil Rights Act of 1991. That Act states that "[a]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice*." 42 U.S.C. § 2000e-2(m) (emphasis added).

The two cases cited by the courts below (*Pennsylvania State Police v. Penn. Human Relations*, 517 A.2d 1253 (Pa. 1986) and *Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996)) are inapposite. *Pennsylvania State* predates the 1991 Act. *Alexander* concerns a case filed under 42 U.S.C. § 1983. The 1991 Act expressly amended Title VII so that section 1983 caselaw no longer applies. The district and circuit courts' reliance on these cases implies a misunderstanding of the 1991 Act.

The statement of law below departs significantly from prior judicial holdings and casts confusion on an important federal question, i.e., what elements must a plaintiff plead to state an employment discrimination case. Last Term, this Court granted *certiorari* and summarily remanded a discrimination case on the grounds that the circuit court improperly stated the elements a plaintiff must plead under section 1983. *Texas v. Lesage*, 528 U.S. 18, 120 S.Ct. 467 (1999). This Court likewise should grant this petition to correct the misstatements of law below regarding the elements of a Title VII case.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW MISSTATE THE LAW.

A. The Civil Rights Act Of 1991 Expressly States That Howard County's "Mixed Motive" Claim Is Not A Defense To Title VII Liability.

This is a "mixed motives" or "same decision" employment discrimination case analogous to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). Price Waterhouse argued that it should not be liable for sex-based employment discrimination because even absent discrimination, the plaintiff would not have been promoted for personality reasons. This Court, applying general principles of liability law, held that the defendant may avoid liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the plaintiff's protected class. *Id.*

Two years later, the Civil Rights Act of 1991 altered *Price Waterhouse's* ruling. The 1991 Act states:

> An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). Officer Matthews thus stated a claim once he alleged that unlawful race-based considerations were a motivating factor in Howard County's decision not to hire him, even if the County would not have hired him for other reasons.

The 1991 Act, moreover, specifies the relief that plaintiffs like Matthews may obtain in mixed motive cases:

> [When] an individual proves a violation under section 2000e- 2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment....

42 U.S.C. § 2000e-5(g)(B). Assuming *arguendo* that Howard County proves its affirmative defense that Officer Matthews would not have been hired anyhow — a burden that Howard County must carry — he nonetheless would

remain entitled to declaratory relief, attorney's fees and costs.[2]

In short, "proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine *not the liability* for discriminatory practices, *but only the appropriate remedy*." H.R. Report No. 102-40 (I) at 48, *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (emphases both added and original). Officer Matthews thus stated a claim and is entitled to relief even if it would "be speculative to infer that plaintiff would have been hired but for the alleged discrimination."

B. The Two Cases Relied Upon By The Courts Below Are Inapposite.

The District Court cited only two cases in support of its holding. Pet. App. 12a. Both citations suggest that the District Court misunderstood the provisions of the 1991 Act. The court cited *Pennsylvania State Police v. Penn. Human Relations*, 517 A.2d 1253 (Pa. 1986), for the proposition that awarding reinstatement and back pay is inappropriate in mixed motive cases. *Pennsylvania State Police* predates the 1991 Act by five years. Indeed, the considerations of that case — i.e., that employers should not be forced to hire or reinstate an individual that they otherwise would not have hired and that back pay is inappropriate if the individual would not in fact have been hired — were incorporated by Congress into the clause (ii) *exceptions* of the 1991 Act. *See infra* 42 U.S.C. § 2000e-

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[2] Matthews requested injunctive relief, but the District Court held that no injunctive remedy was appropriate. Pet. App. 11a. *Amici* make no statement regarding whether appropriate injunctive relief could be fashioned.

5(g)(B)(ii). Matthews is not seeking (and under clause (ii) may not obtain) an order that he be hired. He is seeking only that to which he is entitled, namely the monetary, declaratory and other relief specified in clause (i).

The second case cited by the District Court (and the only case cited by the Court of Appeals), *Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1996), is likewise inapposite. *Alexander* concerns a request for relief under 42 U.S.C. § 1983. Section 1983, unlike Title VII, allows "the government [to] avoid liability by proving that it would have made the same decision without the impermissible motive." *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467, 468 (1999) (*per curiam*). The 1991 Act makes clear that this is not the rule in Title VII cases. 42 U.S.C. § 2000e-2(m).

The use of these two cases below casts doubt on the district and circuit courts' understanding of the 1991 Act. Several cases decided under that Act clearly hold that a plaintiff establishes liability if he or she shows that unlawful race-based considerations played a role in the employment decision. *See* Pet. 8-9 (listing cases). The District Court overlooked these cases. The Court of Appeals' sole reliance on *Alexander* likewise implies that the appellate court may not have fully considered the 1991 Act's provisions.

II. THE DECISIONS BELOW DEPART SIGNIFICANTLY FROM PRIOR JUDICIAL HOLDINGS AND CAST CONFUSION ON AN IMPORTANT FEDERAL QUESTION.

Even though this Court typically does not grant petitions in cases that do not involve substantial conflicts among courts of appeals and state courts of last resort, this

Court's decision last Term to dispose summarily of *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467 (1999), counsels in favor of granting this petition.

Lesage concerned a section 1983 suit brought by an applicant denied admission to a state university. The admissions process was admittedly race-conscious, but the evidence showed that the applicant would not have been admitted even if race were not a consideration. The Court of Appeals ignored the latter factual conclusion, holding that a race-conscious admissions process raises a cognizable injury under section 1983 even if the government would have reached the same decision on non-race grounds. *Id.*

This Court reversed, holding that it has long been the rule in section 1983 cases that the government may defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. *Id.*

That, however, has not been the rule in Title VII cases since the 1991 Act. *Lesage* has apparently created confusion regarding this point. The reliance of the District Court and the Court of Appeals on a section 1983 case (*Alexander*) implies a mistaken belief that section 1983 caselaw governs Title VII cases. It does not.

The issues presented by this petition are at least as substantial as those presented by *Lesage*. There, as here, the court of appeals departed substantially from clearly established law to declare a new rule. There, as here, the new rule substantially affected one of this country's most important public policies – the strong federal interest in preventing unlawful discrimination.

In short, the same considerations that counseled granting the petition in *Lesage* argue for granting the petition in this case. And, as in *Lesage*, disposition of this case need not substantially burden this Court. Summary disposition, as Petitioner suggests, may be appropriate.

CONCLUSION

For the reasons stated herein and in the Petition for *Certiorari*, this Court should grant the Petition.

Respectfully submitted,
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No. 00-874

(3)

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In the Supreme Court of the United States

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HOWARD COUNTY, MARYLAND; CHARLES ECKER; BARBARA KRANKOWSKI; RAQUEL SANUDO; JAMES N. ROBEY; WAYNE LIVESAY; JIMMIE LYNN SAYLOR; AND GWEN K. WEST,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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43 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. SUMMARY OF THE MOVANTS' POSITION	1
II. THE COUNTY'S REASONS FOR WITHHOLDING CONSENT	2
III. CONCLUSION	7
RESPONDENTS' APPENDIX	1a
Ex. A Affidavit of Jimmie L. Saylor	2a
Ex. B Petitioner's Redlined Amended Complaint, Showing Additions to and Deletions from Original Complaint	7a
Ex. C Excerpt from Transcript of Hearing before District Court	32a

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Estepp, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997) 5

Johnson v. Transportation Agency, Santa Clara County California, 480 U.S. 616 (1987) 6

Pennsylvania State Police v. Penn. Human Relations, 517 A.2d 1253 (Pa. 1986) 5

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 3,5

Texas v. Lesage, 528 U.S. 18 (1999) 6,7

Statutes

42 U.S.C. §1981A(b)(3) 4,6

42 U.S.C. §1983 1

42 U.S.C. §§ 2000e et seq. 1

42 U.S.C. §2000e-5(g) 4,6

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Howard County, Maryland, Charles I. Ecker, Barbara Krankowski, Raquel Sanudo, James N. Robey, Wayne Livesay, Jimmie Lynn Saylor and Gwen K. West object to the Motion for Leave to File Brief *Amici Curiae* filed by The Center for Equal Opportunity and the Independent Women's Forum.[1]

I. Summary of the Movants' Position

The Movants have requested leave to file an *Amici Curiae* brief and, in supporting the Motion, assert that the District Court and the Fourth Circuit have misstated the law applicable to lawsuits brought under Title VII. The Movants also assert that the unpublished decisions of both courts depart from prior judicial holdings, and that the unpublished decisions may "cast" or create confusion on an important federal question. More particularly, as to both of these contentions, it is the Movants' position that the District Court and Fourth Circuit improperly held that the "mixed motive" or "same result" defense that is available to employers under 42 U.S.C. §1983, is also available as an absolute defense to a Title VII employment discrimination claim.

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[1]For both clarity and brevity, in this objection the following designations will be used: **"Petitioner"** in referring to Michael S. Matthews; **"Petition"** in referring to the Petition for Writ of Certiorari; **"Movants"** in referring to The Center for Equal Opportunity and the Independent Women's Forum; **"Motion"** in referring to the Motion for Leave to File Brief *Amici Curiae* and Brief for *Amici Curiae*; **"District Court"** in referring to the United States District Court for the District of Maryland; **"Fourth Circuit"** in referring to the United States Court of Appeals for the Fourth Circuit; and **"Title VII"** in referring to 42 U.S.C. §§2000e *et seq.* In addition, the Petitioner seeks no review of the lower courts' determinations that all claims against the individuals named as defendants failed to assert claims for cognizable relief, and were time-barred. Thus, as only the Petitioner's Title VII claim against the County is before the Court, the word **"County"** shall be used in setting forth the reasons for the Respondents' objection.

II. The County's Reasons for Withholding Consent

Believing it was manifest that the Fourth Circuit's decision, and the District Court's decision upon which it was based, neither conflicted with decisions of this Court or other courts of appeal, nor presented an important question of federal law which should be settled by this Court, the County advised this Court on December 20, 2000 that it did not intend to respond to the Petition unless a response was requested by the Court.[2] As the Movants make or repeat statements made by the Petitioner which improperly reflect the facts adduced, as well as the arguments made and decisions rendered in the proceedings below, the Motion is of no help or assistance to the Court.[3]

Contrary to the representations made by the Petitioner and Movants in this Court, the County did not concede, and the District Court did not find, that the County committed unlawful

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[2]The County executed and submitted a "WAIVER" to the Court on December 20, 2000. Movants first contacted the County on December 26, 2000. The County advised Movants on December 27, 2000 that they would withhold their consent for the reasons stated here.

[3]The District Court's Opinion contains an accurate and thorough summary of the undisputed facts and proceedings before the District Court. The Petition and Motion, oppositely, omit important facts and contain unsupported allegations and misstatements of fact. While it is unnecessary to identify each here, the Movants' allegation at page 2 that the "County refused to settle Officer Matthews' individual claim" typifies the manner in which the Movants, who were not parties to the action, have carelessly treated the record. Far from "refusing" to settle with the Petitioner, the record below reveals that the County energetically pursued settlement in good faith, and was advised by the Equal Employment Opportunity Commission ("**EEOC**") that it had offered more in settlement than the EEOC could seek on Petitioner's behalf under the circumstances presented (Resp. App. Ex. A). It was the Petitioner's unreasonable position during conciliation, moreover, that caused the EEOC to invite the County to engage in conciliation with the EEOC alone, an effort which entirely resolved all issues of class relief (Pet. 10a).

discrimination.[4] The County also did not raise, and thus the District Court and Fourth Circuit did not address, a "mixed motive" or "same result" defense of the type raised by the employer in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Instead, it was the County's contention below that, even assuming the County had committed an unlawful employment practice, the Petitioner asserted no claim of employment discrimination that would entitle him to the relief he requested in his complaint. It was also the County's contention below, and it remains the County's contention here, that the Petitioner instituted a broad based, class action lawsuit solely to coerce a favorable settlement with attorneys' fees.

In making their submissions to the Court, neither the Petitioner nor the Movants identify the specific contentions that were made by the County in the District Court. The Petitioner and the Movants do not, moreover, disclose that the Petitioner initiated this action by filing a ten count class action complaint (Pet. 8a) (Resp. App. Ex. B).[5] Finally, neither the Petitioner nor the Movants disclose that in alleging a violation of Title VII in both his original and amended complaint, the Petitioner requested **only** that he be awarded, "back pay in an amount no less than approximately $80,000, to include all benefits, raises, and overtime attributable to the intervening time period that would have been afforded to Michael Matthews but for the said discrimination;" (Resp. App. Ex. B).

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[4]At page ii of the Motion, the Movants suggest that the present case involves a factual scenario where an employer "concedes that unlawful discrimination was a motive in an adverse employment decision." The Movants no doubt framed this issue because the Petitioner improperly or mistakenly stated, at page 2 of the Petition, that the County "concedes" it used a discriminatory hiring process in 1995.

[5]The redlined version of the Petitioner's Amended Complaint, showing the additions to and deletions from his original Complaint, is included in the County's appendix.

The foregoing facts are extremely important. In addition to demonstrating the reasons why the County considered Petitioner's lawsuit a strike suit, these facts demonstrate that the Movants are wrong to suggest, as they do without basis at pages 6-7 of their Motion, that the Petitioner did not seek relief or an award of damages, such as backpay, under Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g). Indeed, when the District Court references the Petitioner's claim for "monetary damages stemming from the fact that he was not hired in the first instance" (Pet. 12a), the District Court is specifically referencing the Petitioner's request for backpay, and not a request for compensatory damages under 42 U.S.C. §1981A(b)(3). It is courts which are given the discretion to fashion equitable remedies under Title VII. The Civil Rights Act of 1991, 42 U.S.C. §1981A(b)(3), which permits the recovery of damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses, does not include an entitlement to backpay or any type of relief authorized under Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g).

As the Petitioner requested only backpay for the alleged violations of Title VII (Resp. App. B),[6] the County was required to raise, and the District Court to consider, the question of whether the Petitioner was entitled to this relief. This same inquiry required the District Court to determine whether a reasonable factfinder could find that the Petitioner would have been hired but for the conduct alleged to be discriminatory, and whether the Petitioner would therefore be eligible for a

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[6]As the District Court correctly noted, the Petitioner made no claim for compensatory damages under Title VII in his amended complaint, and did not, in any event, allege facts that would meet the standards of proof established by the Fourth Circuit for seeking such damages (Pet. 13a). In addition, neither the Petitioner nor the Movants, as evidenced by footnote 2 on page 6 of their Motion, claim that the District Court abused its discretion in finding that no injunctive or equitable relief was appropriately granted to Petitioner under the facts of this case.

backpay award. In conducting this inquiry, it was appropriate for the District Court to rely on the cases referenced in its decision, including *Pennsylvania State Police v. Penn. Human Relations,* 517 A.2d 1253 (Pa. 1986) and *Alexander v. Estepp,* 95 F.3d 312 (4th Cir. 1996), *cert. denied,* 520 U.S. 1165 (1997), as each was relevant to and supported the District Court's decision, in the proper exercise of its discretion, that Petitioner was not entitled to any injunctive or equitable relief, including backpay, under the facts of this case. It also bears repeating, in this regard, that the Petitioner raised numerous constitutional challenges in the District Court which mirrored his Title VII claim. In rendering their decisions that these claims too set forth no cognizable claim for relief, it was entirely appropriate for the District Court and Fourth Circuit to rely upon and reference *Alexander*.

The Movants and Petitioner, in short, mistakenly characterize the District Court's painstaking analysis of the reasons why Petitioner was entitled to no relief under the various claims he filed, as an application of the burden-shifting, mixed-motive analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[7] The *Price Waterhouse* mixed-motive analysis, however, did not come into play in this case. Its applicability is limited to those cases where both legal and illegal motivations are proven to coexist. Here, both the District Court and Fourth Circuit could readily determine that the Petitioner was entitled to no relief under his complaint, without deciding whether the action taken by the County, in reliance on the affirmative action plan of its police department, violated Title VII (Pet. 9a-11a).

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[7]Under the burden shifting analysis of *Price Waterhouse*, if an employer's articulated reason for an employment decision is found pretextual and discrimination is found to have, in fact, played a role in the employment decision, then the employer may avoid liability "only by proving that it would have made the decision even if it had not allowed [discrimination] to play such a role." *see id.* at 244-245.

Employers, of course, may consider matters of race and gender in constructing an affirmative action program without violating Title VII. *Johnson v. Transportation Agency, Santa Clara County California*, 480 U.S. 616, 640-641 (1987). In the present case, however, both the District Court and the Fourth Circuit properly concluded that a legal test of the validity of the County's plan, in which the Petitioner would bear the burden of proof, *Johnson, id.* at 627, would be an academic exercise.[8] This was so because: 1) the factors of gender and race were not the only factors considered by the County in the hiring process; 2) the County had voluntarily, and by its conciliation agreement with the EEOC, discontinued using the practice about which the Petitioner complained, and fully resolved all issues of class relief;[9] and 3) the Petitioner himself was otherwise entitled to no relief. Again, neither the Petitioner nor the Movants contend here that the District Court abused its discretion in finding that the Petitioner was not entitled to monetary, injunctive, or equitable relief under 42 U.S.C. §2000e-5(g), nor in finding that the Petitioner did not plead or allege facts that would constitute a cognizable claim for compensatory damages under 42 U.S.C. §1983A(b)(3) (Pet. 12a-13a).

Finally, the County briefly addresses the Movants' conjecture, at page 8 of their submission, that *Texas v Lesage*, 528 U.S. 18 (1999) has "apparently" created confusion for federal courts addressing "mixed motive" or "same result" defenses under Title VII. Aside from the fact that

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[8]In explaining that it is not the business of the courts to decide academic issues, the District Court described the Petitioner's action as one ". . . where lawyers, frankly you, (referring to Petitioner's counsel) can benefit from having this big litigation about affirmative action programs and I'm not interested in seeing public moneys spent on that . . ." (Resp. App. Ex. 3).

[9]Employers, like the County, who endeavor in good faith to fully, fairly and finally resolve discrimination complaints during the administrative processing of a charge, would be severely prejudiced if litigants were permitted to seek a judicial order requiring them to do that which they had, in a conciliation agreement with the EEOC, already agreed to do (Pet. 13a).

conjecture alone provides no reason, let alone a compelling reason, for the Court to exercise its discretion in granting a writ of certiorari, the Movants' conjecture is entirely misplaced in this case. This is so because, in addition to the reasons already stated, neither the District Court nor the Fourth Circuit mention *Lesage*. As the lower courts did not mention or rely on *Lesage*, it cannot reasonably be suggested that their unpublished decisions will create confusion for other courts of appeals.

III. Conclusion

As the foregoing demonstrates, even at this late date, the Petitioner and Movants misapprehend the County's arguments below, and the bases for the decisions rendered by the District Court and Fourth Circuit. The decisions of the District Court and the Fourth Circuit are **not** inconsistent with decisions of other United States courts of appeals, nor with decisions of this Court on the same matters. There is, in short, no important question of federal law which has not been, but should be, settled by this Court. Thus, the Movants' motion, as well as the Petition, should be denied.

Respectfully submitted,

HOWARD COUNTY OFFICE OF LAW

Barbara M. Cook
County Solicitor

Louis P. Ruzzi
Senior Assistant County Solicitor
George Howard Building
3430 Courthouse Drive
Ellicott City, Maryland 21043
(410) 313-2104

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2001, three copies of the Objection to Motion for Leave to File Brief Amici Curiae were mailed, postage prepaid, to:

Theodore M. Cooperstein, Esquire
1815 Pennsylvania Avenue, N.W.
Suite 501
Washington, D.C. 20006

R. Alexander Acosta, Esquire
Erik S. Jaffe, Esquire
Erik S. Jaffe, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008

Louis P. Ruzzi
Senior Assistant County Solicitor

RESPONDENTS' APPENDIX

		Page
Ex. A	Affidavit of Jimmie L. Saylor	2a
Ex. B	Petitioner's Redlined Amended Complaint, Showing Additions to and Deletions from Original Complaint	7a
Ex. C	Excerpt from Transcript of Hearing before District Court	32a

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
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CLERK'S OFFICE
AT BALTIMORE
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL S. MATTHEWS	:	
Plaintiff	:	
v.	:	Civil Action No. JFM 99-2032
HOWARD COUNTY, MARYLAND, et al.	:	
Defendants	:	

REPLY AFFIDAVIT

1. I, Jimmie L. Saylor, am competent to testify.

2. I have previously filed an Affidavit in this proceeding, the contents of which I incorporate here by reference.

3. On behalf of Howard County, Maryland, I attended a conciliation conference which was held in the offices of the United States Equal Employment Opportunity Commission on October 14, 1998. The Plaintiff also appeared at this conference.

4. During the course of this conference, I indicated that the County was willing to offer the Plaintiff an employment position, provided that he completed the final stages of the application process, including a background examination, polygraph examination and psychological and medical screening. In response to this proposal, the Plaintiff stated that he had no interest in working for the County. Additionally, the Plaintiff stated that his interest was money, and demanded the payment of $80,000.00. Later, during the meeting, the Plaintiff demanded $65,000.00, and

threatened that if he were not to receive this amount, he would disclose to the press and to the public that the County discriminates against while males.

5. After conveying the Plaintiff's position to the County's Personnel Officer, I wrote to the Equal Employment Opportunity Commission on October 28, 1998 to confirm the substance of our conversations, to indicate again the reasons why the County could not concede it had violated Title VII, and to explain why the threats made by the Plaintiff could not alter our position.

6. After explaining our position, the EEOC's representative, Chester Kleinman, told me that the County had made a reasonable proposal for conciliation, and that conciliation with the Plaintiff would obviously not be possible. As a result, the EEOC requested, and the County agreed, to consider all other matters arising from the Plaintiff's Charge, including the class remedy included in the Conciliation Agreement (Exhibit 14).

7. A true and correct copy of the correspondence which I forwarded to the EEOC on October 28, 1998, is appended to this Affidavit.

I do solemnly affirm under the penalties of perjury that the contents of the foregoing Reply Affidavit are based upon personal knowledge and are true and correct.

Date: October 8, 1999

Jimmie L. Saylor

Office of Law
Howard County, Maryland

Howard County
MARYLAND

Department of County Administration
OFFICE OF HUMAN RESOURCES

Jimmie Lynn Saylor, Administrator

October 28, 1998

VIA MAIL AND FACSIMILE: (410) 962-3932
Mr. Chester J. Kleinman, Enforcement Manager
United States Equal Employment Opportunity Commission
Baltimore District Office
10 South Howard Street
Baltimore, Maryland 21201

RE: Charge No. 120-96-0063
Matthews v. Howard County, Maryland

Dear Mr. Kleinman:

On behalf of Howard County, Maryland, I write to respond to the matters discussed in the conciliation conference which was held in your offices on October 14, 1998. While I appreciate the efforts which the Commission made to conciliate this matter, Mr. Matthews' unreasonable position and threats make it impossible for the County to accept his demand for settlement. While I indicated in our meeting that the County could agree to many of the conditions which the Commission proposed as an adjunct to the settlement of this matter, some of the relief sought by the Commission continues, in our view, to evidence a misapprehension of the selection process used by the County in 1995.

First, I need say little about Mr. Matthews' reduced demand for $65,000.00, as you yourself advised both the parties at the conciliation conference that Mr. Matthews demanded more than the Commission would seek on his behalf under the circumstances presented. Mr. Matthews' threats that he will disclose to the press and the public at large that the County discriminates against white males offers no incentive for the County to pay this monetary demand. The County has been completely open and forthright about its actions. Stating the matter another way, the County has nothing to hide. In fact, as a public agency, and assuming appropriate legal process, the County understands that any and all of its actions

are subject to public scrutiny. We do not and cannot seek to buy Mr. Matthews' silence.

Reflecting upon the statements that you made at the conciliation conference, we also continue to be greatly confused by the Commission's position.[1] At our meeting, you stated that it was absolutely impermissible for the County to have used race and sex as a plus factor during the appointment process in 1995. While it did not occur to me at the time, your statement seems to indicate that the action you found to be discriminatory was revealed to you by the County in April of 1996. Your statement also seems to suggest that it is the Commission's position that no public employer may have a voluntary affirmative action plan. Indeed, given your statement, and as the Commission did not address the affirmative action plan developed by our Department of Police in either its Determination, or in its response to my August 21, 1998 correspondence, I was at a loss to explain to County officials why you, Ms. Byrd, and Ms. Miller sought information from us concerning the Department's affirmative action goals in the time period between 1996 and 1998.

Finally, in connection with the Commission's position, we still do not understand why the Commission would propose that the County make job offers to all white males receiving two interviews of "excellent", and one of "satisfactory". As I pointed out in my earlier letters and at our meeting, there were only 26 positions to be filled, and there is no dispute that 50 white males received three scores of "excellent" in the interview process. Had we known in 1995 that it would be the Commission's position that we could not have a voluntary affirmative action plan, we would have advanced only those candidates receiving three scores of

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[1]As you know, the County advised you on a number of occasions that it used race and sex as a plus factor in moving candidates with two scores of "excellent" and one of "satisfactory" to the background phase of the hiring process because: (1) the County believed, rightly or wrongly, that it could make such a decision in order to meet the operational needs of an urban police department serving a diverse population; (2) the County wished to address the historic under-representation of women and minorities in the Police Department; and (3) the County simply did not have the resources to conduct background investigations for the roughly 150 people who had received at least two scores of "excellent" and one of "satisfactory" during the oral interviews. Rather than repeating the contents of my earlier letters in their entirety, I incorporate by reference the entirety of my April 16, 1996, January 10, 1997, May 12, 1997 and August 21, 1998 letters.

excellent to the background phase. As a result, none of the persons receiving lesser scores, including Mr. Matthews and the other candidates referenced in the Conciliation Agreement which you have prepared, would have been considered.

In addition, I emphasize again that had Mr. Matthews and other similarly situated white male candidates been moved to the background stage of the process, there is no certainty that they would have successfully completed the background phase or the polygraph examination phase, or that they would have been considered the best candidates after the information received on all candidates at each of these stages was considered and compared. Again, even if the Commission believes that the County improperly failed to move Mr. Matthews and others forward in the process on this single occasion, the fact remains that these persons might not have received offers of employment for other valid and legitimate reasons. While the County was willing to place Mr. Matthews and others similarly situated into the final stages of the selection process in its current and future recruitment processes, we simply cannot offer jobs to people without having them complete the full screening process. As I am certain the Commission can understand, the County would be exposed to significant liability if an offer of employment was made to a candidate who had not successfully passed all phases of our process, including psychological screening, before being placed on the streets to perform the demanding duties of a police officer.

As we are yet without a full understanding of the rationale for your decision, and as you yourself have advised us that Mr. Matthews' demands are not appropriate, we have no alternative but to reject your conciliation proposal. Should you have any additional questions concerning the County's position, please do not hesitate to contact me.

Very truly yours,

Jimmie L. Saylor
Human Resources Administrator

cc: Barbara Veldhuizen, Acting District Director
Raquel Sanudo, Chief Administrative Officer
G. Wayne Livesay, Acting Chief of Police
Barbara M. Cook, County Solicitor

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RECEIVED
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OFFICE OF LAW

MICHAEL S. MATTHEWS, in his own Right, and as Representative on behalf of a Class of Plaintiffs Similarly Situated,
400 North Rock Glen Road,
Baltimore, Maryland 21229,
Plaintiff,

V.

HOWARD COUNTY, MARYLAND, a Charter Entity, c/o Howard County Office of Law, 3430 Court House Drive, Ellicott City, Maryland 21043;
CHARLES ECKER, in both his Individual and Official Capacities;
BARBARA KRANKOWSKI, in both her Individual and Official Capacities, Office of Personnel, 3430 Court House Drive, Ellicott City, Maryland 21043;
RAQUEL SANUDO, in both her Individual and Official Capacities, Office of Personnel, 3430 Court House Drive, Ellicott City, Maryland 21043;
JAMES N. ROBEY, in both his Individual and Official Capacities, Howard County Government, 3430 Court House Drive, Ellicott City, Maryland 21043;
WAYNE LIVESAY, in both his Individual and Official Capacities, Howard County Department of Police, 3410 Court House Drive, Ellicott City, Maryland 21043;
JIMMIE LYNN SAYLOR, in both her Individual and Official Capacities, Office of Personnel, 3430 Court House Drive, Ellicott City, Maryland 21043;
and GWEN K. WEST, in both her Individual and Official Capacities, Office of Personnel, 3430 Court House Drive, Ellicott City, Maryland 21043;

Defendants.

Civ.[il Action] No.
JFM 99-2032

JURY TRIAL DEMANDED

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff Michael S. Matthews, by his undersigned counsel, in his own right and on behalf of a class (the "Plaintiff Class") of similarly situated plaintiffs (collectively, the "Plaintiffs"), pursuant to Federal Rule of Civil Procedure (Fed. R. Civ. P.) 23, avers for his Complaint in this action, on direct knowledge as to himself, and on information and belief as to all other matters and persons, the following:

Nature of This Action

1. This is action is a civil rights lawsuit against the Howard County government and its officers and officials, in their individual as well as official capacities, for racial and sexual discrimination in violation of federal statutes, and for the violation of Constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution to Plaintiff Michael Matthews and to a class of similarly situated plaintiffs. This action seeks declaratory and injunctive relief as well as both compensatory and punitive damages for Plaintiff Matthews and all other members of the Plaintiff Class. A formal Determination by the United States Equal Employment Opportunity Commission (the "EEOC") has issued, finding reasonable cause that the Defendants have unlawfully and intentionally discriminated on the basis of race and sex in their hiring and evaluation process for applicants to the Howard County Police Department. In so doing, the Defendants without due process deprive the Plaintiff and others like him of their basic Constitutional rights and civil liberties, as well as stigmatize them for future employment by law enforcement agencies who could question or suspect the basis for the applicants' rejection by Howard County. This calculatedly unfair treatment also violates the Constitutional guarantee of equal protection of the laws in that Plaintiff Matthews and the other members of the Plaintiff Class suffer discrimination and barriers to advancement

solely on the basis of their skin color or sex. As a result, these actions by Howard County and its individual officers violate the Plaintiffs' fundamental rights as American citizens.

Jurisdiction and Venue

2. This Court has jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331; federal civil rights jurisdiction, 28 U.S.C. § 1343; the Declaratory Judgment Act, 28 U.S.C. § 2201; [the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(c);] the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

3. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391, in that some or all Defendants reside in this State and that a substantial part of the acts and omissions giving rise to the claims herein occurred in this District.

Parties

4. Plaintiff Michael S. Matthews is (and was at the time he applied for employment) an adult white male over the age of forty years, a citizen of the United States, and resides in the City of Baltimore, Maryland. He was an unsuccessful applicant for the position of Probationary Police Officer with the Howard County Department of Police. As a result of his unlawful denial for employment by the Howard County Police Department, he has been stigmatized from most future employment by other law enforcement agencies.

5. Defendant Howard County, Maryland is a local government charter entity under the laws of the State of Maryland. Howard County is liable, as an employer under Title VII of the Civil Rights Act of 1964 as amended and under the Age Discrimination

in Employment Act (the "ADEA"), and as a person under the Civil Rights Acts of 1866 and 1871, for its policies, practices, and customs established and enforced under the color of state law, denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Those policies, practices and customs violate the rights of Plaintiff Michael Matthews and members of the Plaintiff Class under federal laws and the Constitution of the United States.

6. Defendant Charles Ecker was at times relevant to this action the County Executive for Howard County, Maryland. Ecker in his official capacity oversaw, approved and supervised the establishment, implementation, and enforcement of the policies, practices and customs of Howard County objected to by this Class Action Complaint, denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Ecker in his individual capacity acted under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

7. Defendant Barbara Krankowski was at times relevant to this action [Chief Personnel Administrator] **an Administrative Services Officer in the Department of Police** for Howard County, Maryland. Krankowski in her official capacity supervised and/or took part in the establishment, implementation, and enforcement of the policies, practices and customs of Howard County objected to by this Class Action Complaint,

denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Krankowski in her individual capacity acted under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

8. Defendant Raquel Sanudo was at times relevant to this action Chief Personnel Administrator for Howard County, Maryland. Sanudo in her official capacity supervised and/or took part in the establishment, implementation, and enforcement of the policies, practices and customs of Howard County objected to by this Class Action Complaint, denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Sanudo in her individual capacity acted under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

9. Defendant James Robey was at times relevant to this action the Chief of Police, and is presently the County Executive, of Howard County, Maryland. Robey in his official capacities initially supervised and/or took part in, and now oversees, approves and supervises, the establishment, implementation, and enforcement of the policies, practices and customs of Howard County objected to by this Class Action Complaint,

denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Robey in his individual capacity acted and continues to act under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

10. Defendant Wayne Livesay was at times relevant to this action a senior officer of the Howard County Department of Police, and is presently the Chief of Police for Howard County, Maryland. Livesay in his official capacities supervises and/or takes part in, the establishment, implementation, and enforcement of the policies, practices and customs of Howard County objected to by this Class Action Complaint, denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Livesay in his individual capacity acted and continues to act under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

11. Defendant Jimmie Lynn Saylor was at times relevant to this action Administrator, Office of Personnel, Howard County Department of County Administration. Saylor in her official capacity supervised and/or took part in the establishment, implementation, and enforcement of the policies, practices and customs of

Howard County objected to by this Class Action Complaint, denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. Saylor in her individual capacity acted under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

12. Defendant Gwen K. West was at times relevant to this action Personnel Analyst in the Office of Personnel, Howard County Department of County Administration. West in her official capacity supervised and/or took part in the establishment, implementation, and enforcement of the policies, practices and customs of Howard County objected to by this Class Action Complaint, denying white male applicants, solely on the basis of their sex or race, a full and fair opportunity to compete for employment with the Howard County Police Department. West in her individual capacity acted under color of state law to conspire with the other Defendants to deprive the Plaintiffs of their Constitutionally protected rights; to actually deprive the Plaintiffs of those Constitutionally protected rights; and to fail to prevent or aid in preventing the conspiracy and deprivation of those Constitutionally protected rights.

Class Action Allegations

13. This action is brought by the named Plaintiff as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, (1) for and on behalf of all white males who applied for, or may subsequently apply for, the position of Probationary Police Officer with the Defendant Howard County, within the time period covered by the charges filed

by Plaintiff Michael Matthews with the EEOC, that he was denied a full and fair opportunity to compete for a probationary position with the Howard County Police Department solely on the basis of his race or sex, as well as for the remainder of the period that these policies, practices and customs have been and continue to be in force; and (2) for and on behalf of all qualified white males in the work force who, because of the Defendants' policies, practices or customs of discrimination, would have applied for such positions during that same period had it not been for their knowledge of the discrimination practiced by the Defendants as set forth below.

14. The proposed Plaintiff Class is so numerous that joinder of all potential individuals as plaintiffs is impracticable.

15. There are questions of law and fact common to the Class, which questions predominate over any questions affecting only individual Class members. The claims of Michael Matthews are typical of the claims of Class members.

16. Plaintiff Michael Matthews can fairly and adequately protect the interests of the Class.

17. Defendants have acted and refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive and compensatory relief with respect to all members of the Class.

18. Defendants are and have been engaged in employment practices that emanate from a common plan or scheme uniformly applicable to all white, male applicants for probationary police officer positions, as set forth in detail below.

Facts Common to All Counts of the Complaint

19. On or about July 1995, Michael Matthews applied for employment as a Probationary Police Officer with the Howard County Department of Police.

20. Michael Matthews successfully passed the physical ability test, including a distance drag of a weighted dummy, for the position of Police Officer (Probationary).

21. No female applicants who took the physical ability test on the same day that Michael Matthews tested for physical ability passed that test.

22. The female applicants who failed the physical ability test taken on the same day as Michael Matthews were invited back to retake the test, and those female applicants who retook the test did so using a dummy weighing less than the dummy used to test Matthews and other male applicants.

23. Michael Matthews and other male applicants received no notice from Howard County during the application process that female applicants who had failed the physical ability test were given the opportunity to retake that test.

24. On or about July 20, 1995, Michael Matthews successfully passed the written examination for Probationary Police Officer.

25. Following the written examination, Michael Matthews completed and submitted a Personnel History Questionnaire form.

26. Personnel History Questionnaire forms for Michael Matthews and all other applicants were evaluated and graded on a 20-point scale.

27. Michael Matthews received a score of 10 or greater on his Personnel History Questionnaire.

28. No white male applicants with a Personnel History Questionnaire score less than 10 were advanced to the interview stage of the application process.

29. Applicants who were not white or not male [or under the age of forty] and who received scores of less than 10 were advanced to the interview stage of the application process.

30. Defendants Krankowski, Sanudo, Robey, Livesay, Saylor and West, each and all discriminated against Plaintiff Matthews and the Plaintiff Class on the basis of their sex and/or race in evaluating their Personnel History Questionnaires for advancement in the employment process.

31. A panel of three interviewers interviewed applicants advanced to the interview stage of the application process. Each interviewer rated an applicant as "Excellent," "Acceptable," or "Not Acceptable."

32. The three interviewers on Michael Matthews' panel were Defendant West, Police Officer Norman Snyder and Dennis Matthews.

33. Michael Matthews received final ratings of "Excellent," "Excellent," and "Acceptable" from his three interviewers.

34. White male applicants who received less than three "Excellent" ratings from their interviews advanced no further in the application process and were denied further opportunity to compete for employment.

35. Applicants who were not white or not male [or under the age of forty] and who received only two ratings of "Excellent" were advanced in the application process and permitted to compete for employment.

36. On or about December 18, 1995, Defendant West wrote to Michael Matthews, informing him that although he was qualified, he was not selected to proceed in the hiring process.

37. The denial to Michael Matthews and to the Plaintiff Class of the full and fair opportunity to compete for employment in the Howard County Police Department resulted directly from a policy, practice or custom of illegal discrimination on the basis of race[,] **or** sex[, or age].

38. Each of the individual Defendants knew, acquiesced in, or took part in the policy, practice or custom of Howard County to discriminate against Plaintiff Michael Matthews and other members of the Plaintiff Class.

39. The Defendants established or applied the discriminatory policy, practice or custom of Howard County with deliberate indifference to the Constitutional and federal statutory rights of Michael Matthews and other members of the Plaintiff Class.

40. The discriminatory policy, practice or custom of the Defendants had been ongoing for some years prior to Michael Matthews' application for employment, and **continued**[s to this day] **until entry of a conciliation agreement between Howard County and the EEOC on or about March 9, 1999**.

41. The denial to Plaintiff Michael Matthews and the Plaintiff Class of the full and fair opportunity to compete for employment in the Howard County Police Department, without any legitimate or lawful substantive basis, stigmatized Michael Matthews and members of the Plaintiff Class and permanently harmed their prospects of future employment in law enforcement.

42. Plaintiff Michael Matthews has exhausted his administrative remedies with Howard County.

43. Plaintiff Michael Matthews has filed a complaint of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), alleging that the

Defendants unlawfully discriminated against him on the basis of his race, his sex, and his age.

44. After investigation, the EEOC determined that the Defendant Howard County admits to having treated minority and female candidates more favorably than white male candidates with regard to selection decisions for Police Officer positions. In its Determination dated June 25, 1998, the EEOC stated there is reasonable cause to believe that Howard County has engaged in a pattern and practice of discrimination against Michael Matthews and white males as a class with respect to making selection decisions for Police Officer positions. EEOC declared that Howard County thereby has violated Title VII of the Civil Rights Act of 1964 by giving impermissible consideration to applicants' race and sex in making Police Officer selection decisions. The EEOC made no finding with respect to charges under the ADEA. A copy of the EEOC Determination is attached to this Class Action Complaint as Exhibit A.

45. On or about April 9, 1999, the EEOC mailed to Plaintiff Michael Matthews a "Notice of Right to Sue" letter. Plaintiff Matthews has accordingly met all procedural prerequisites for filing suit under the Civil Rights Act of 1964, as amended. A copy of the EEOC Notice of Right to Sue letter is attached to this Class Action Complaint as Exhibit B.

COUNT I

(As Against Defendant Howard County)

(Violations of the Civil Rights Act of 1964)

46. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

47. At all times relevant to this action, the right of Plaintiff Michael Matthews and the Plaintiff Class to compete fully and fairly for employment without discrimination on the basis of race or sex was a clearly established right of which the Defendants knew or should have known.

48. In discriminating against Michael Matthews and other members of the Plaintiff Class on the basis of their race or sex, to deny them the full and fair opportunity to compete for employment with the Howard County Police Department, the Defendant [s] **Howard County** violated the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

49. Defendants' conduct was willful, intentional, and conducted with deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class .[, thereby meriting punitive damages.]

COUNT II

[(Violation of the Age Discrimination in Employment Act)]

50. [Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.]

51. [Defendant Howard County is an employer within the meaning of that term as used in 29 U.S.C. § 623.]

52. [In discriminating against Michael Matthews, on the basis of his age, to deny him the full and fair opportunity to compete for employment with the Howard County Police Department, the Defendants violated the Age Discrimination in Employment Act,

29 U.S.C. § 621 et seq., inasmuch as the employment decisions concerning Michael Matthews were based in whole or in part upon his age.]

53. [Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael-Matthews, thereby meriting liquidated damages.]

COUNT II[I]

(Section 1983: Due Process – Sex Discrimination)

54. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

55. All times relevant to this action, the right to due process under the Fourteenth Amendment to the United States Constitution was a clearly established right of which all Defendants knew or should have known

56. In denying Michael Matthews and the Plaintiff Class, on the basis of their sex, the full and fair opportunity to compete for employment in the Howard County Police Department, the Defendants acted under color of state law to deny the right to due process guaranteed by the Fourteenth Amendment of the Constitution of the United States and Section 1983 of Title 42 of the United States Code.

57. The Defendants' denial of Constitutional due process to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

58. Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

COUNT I[V]II

(Section 1983: Due Process – Racial Discrimination)

59. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

60. All times relevant to this action, the right to due process under the Fourteenth Amendment to the United States Constitution was a clearly established right of which all Defendants knew or should have known

61. In denying Michael Matthews and the Plaintiff Class, on the basis of their race, the full and fair opportunity to compete for employment in the Howard County Police Department, the Defendants acted under color of state law to deny the right to due process guaranteed by the Fourteenth Amendment of the Constitution of the United States and Section 1983 of Title 42 of the United States Code.

62. The Defendants' denial of Constitutional due process to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

63. Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

COUNT IV

(Section 1983: Equal Protection – Sex Discrimination)

64. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

65. All times relevant to this action, the right to equal protection under the Fourteenth Amendment to the United States Constitution was a clearly established right of which all Defendants knew or should have known.

66. In denying Michael Matthews and the Plaintiff Class, on the basis of their sex, the full and fair opportunity to compete for employment in the Howard County Police Department, the Defendants acted under color of state law to deny the right to equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and Section 1983 of Title 42 of the United States Code.

67. The Defendants' denial of Constitutional equal protection to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

68. Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

COUNT V [I]

(Section 1983: Equal Protection—Racial Discrimination)

69. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

70. All times relevant to this action, the right to equal protection under the Fourteenth Amendment to the United States Constitution was a clearly established right of which all Defendants knew or should have known.

71. In denying Michael Matthews and the Plaintiff Class, on the basis of their race, the full and fair opportunity to compete for employment in the Howard County Police Department, the Defendants acted under color of state law to deny the right to equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and Section 1983 of Title 42 of the United States Code.

72. The Defendants' denial of Constitutional equal protection to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

73. Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

[COUNT VII]

[(Section 1983: Violation of Federal Statutorily Protected Right)]

74. [Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.]

75. [At all times relevant to this action, the right to be free from age discrimination under the Age Discrimination in Employment Act was a clearly established right of which the Defendants knew or should have known.]

76. [In denying Michael Matthews and the Plaintiff Class, on the basis of their age, the full and fair opportunity to compete for employment in the Howard County Police Department, the Defendants acted under color of state law to deny the right to be free from age discrimination guaranteed by Title 29 of the United States Code.]

77. [The Defendants' denial of the right to be free from age discrimination to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.]

78. [Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.]

COUNT VI [III]

(Section 1981: Racial Discrimination)

79. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

80. All times relevant to this action, the right to freedom of contract absent racial discrimination under the Fourteenth Amendment to the United States Constitution was a clearly established right of which all Defendants knew or should have known.

81. In denying Michael Matthews and the Plaintiff Class, on the basis of their race, the full and fair opportunity to compete for employment in the Howard County Police Department, the Defendants acted under color of state law to deny the right to freedom of contract absent racial discrimination guaranteed by the Fourteenth Amendment of the Constitution of the United States and Section 1981 of Title 42 of the United States Code.

82. The Defendants' denial of Constitutional freedom of contract absent racial discrimination to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

83. Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

COUNT VII [IX]

(As Against All Individual Defendants)

(Section 1985: Conspiracy)

84. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

85. Each and all of the **individual** Defendants conspired to deprive Michael Matthews and the Plaintiff Class of their Constitutionally protected rights as set forth above.

86. In conspiring to deny Michael Matthews and the Plaintiff Class, on the basis of their race, sex or age, the full and fair opportunity to compete for employment in the Howard County Police Department, the **individual** Defendants acted under color of state law to deny the rights guaranteed by the Fourteenth Amendment of the Constitution of the United States and Section 1985 of Title 42 of the United States Code.

87. The **individual** Defendants' conspiracy to deny those Constitutional rights to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

88. **The individual** Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

COUNT VIII [X]

(As Against All Individual Defendants)

(Section 1986: Negligent Failure to Prevent)

89. Plaintiff repeats and reavers all foregoing paragraphs as though fully set forth herein.

90. Each of the individual Defendants knew or should have known that the wrongs conspired to be done in violation of the constitutional and statutory rights of Michael Matthews and the Plaintiff Class, as set forth above, were about to be committed.

91. Each of the individual Defendants had power to prevent or aid in preventing the commission of the same conspiracy set forth above, yet each Defendant neglected or failed to do so.

92. The **individual** Defendants' negligent failure to prevent conspiracy to deny those Constitutional rights to Michael Matthews and the Plaintiff Class caused him and the other members of the Plaintiff Class compensable injury.

93. **The individual** Defendants' conduct was willful, intentional, and conducted in deliberate indifference or reckless disregard of the rights of Michael Matthews and the Plaintiff Class, thereby meriting punitive damages.

WHEREFORE, Plaintiff respectfully prays that this Court grant the following relief:

A. Certification of the Class of Plaintiffs represented by Michael Matthews in this action for the claims set forth above against the Defendants;

B. Declaratory judgment that the Plaintiff and the Plaintiff Class which he represents have suffered violations of their Constitutional and federal statutory rights against discrimination on the basis of race **and[,]** sex **[**, and age**]** by reason of the actions and policies of the Defendants as detailed above;

C. Injunctive relief, enjoining the Defendant Howard County and the individual Defendants in their official capacities, to cease and desist their policies, practices or customs violating the Plaintiff's and the Plaintiff Class's Constitutional and statutory rights, and barring the continuation or recurrence of the offending policies, practices or customs;

D. On Count I of the **First Amended** Class Action Complaint, entry of Judgment against the Defendant Howard County awarding the Plaintiff Michael Matthews backpay in an amount no less than approximately $80,000, to include all benefits, raises, and overtime attributable to the intervening time period that would have been afforded to Michael Matthews but for the said discrimination; and similarly awarding backpay and all other benefits to the qualifying members of the Plaintiff Class similarly aggrieved by the Defendants' offending policies, practices or customs;

E. **[**On Count II of the **First Amended** Class Action Complaint, entry of Judgment against the Defendant Howard County awarding the Plaintiff Michael Matthews backpay in an amount no less than approximately $80,000, and frontpay, to include all benefits, raises, and overtime attributable to the intervening time

period that would have been afforded to Michael Matthews but for the said age discrimination; and similarly awarding backpay and frontpay to the qualifying members of the Plaintiff Class similarly aggrieved by the Defendants' offending policies, practices or customs;]

F. On Count II [I] of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

G. On Count III of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

H. On Count IV of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

I. On Count V of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars

($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

J. On Count VI of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

K. On Count VII of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all **individual** Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

L. On Count VIII of the **First Amended** Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all **individual** Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;

M. [On Count IX of the Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;]

N. [On Count X of the Class Action Complaint, entry of Judgment on behalf of Michael Matthews and on behalf of each member of the Plaintiff Class against all Defendants, jointly and severally, in the amount of one million dollars ($1,000,000) in compensatory damages and ten million dollars ($10,000,000) in punitive damages;]

O. Award to Plaintiff Michael Matthews of his attorneys fees pursuant to [29 U.S.C. § 216(b);] 42 U.S.C. § 1988; and 42 U.S.C. § 2000e-5(k);

P. Award to Plaintiff Michael Matthews of the costs of this action; and

Q. Such other and further relief as the Court should deem just and proper.

Dated: **September 17** [July 9], 1999

Respectfully submitted,

/s/

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Michael S. Matthews and a
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Situated

what they did was wrong. It could be easy. But I'm not absolutely sure that it is and it seems to me that the focus ought to be here on -- frankly, as I say, I'm not naive. I can see this case -- obviously, there is a political with a small "p" aspect of this case. It's a case where lawyers, frankly you, can benefit from having this big litigation about affirmative action program and I'm not interested in seeing public moneys spent on that if the dispute between the parties can be resolved on the front end because that to me is what the litigation process is all about. And I think the way I want this structured is to find out what your client wants, what he realistically can get, whether or not if you want to brief the issue of -- I think you'll be doing your own dime if you end up losing it -- of broad injunctive relief for class or a class based in the future. I'm not interested in that. This seems to me to be an historic dispute to which your client feels aggrieved. If he's entitled to relief either monetary damage, if there's something else, then he should get it. But there ought to be focused discovery on what it is. The county may want to end up making an offer of judgment or something early on the case. But I'm